IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 64 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

KESHABHAI JIVABHAI PATANI

Versus

ARJANDAS L PARIYANI

Appearance:

MR VASANT S SHAH for Petitioner

MR DEVANAND DEVNANI for Respondent No. 1

CORAM : MR.JUSTICE A.L.DAVE

Date of decision: 19/02/2001

ORAL JUDGEMENT

1. The appellant herein is the plaintiff in Civil Suit No. 5173/2000 pending before City Civil Court at Ahmedabad. The suit was for injunction against construction of wall allegedly proposed to be made by the defendant on an open space which falls between the front of plaintiff's house and the rear of the defendant's premises. According to the plaintiff the defendant proposes to make this construction by encroaching upon this land which adversely affects the road of the plaintiff to use the said open space which he has been using for more than twenty years. On the other hand the case of the defendant is that, he does not want to make any new construction. He only wants to rebuild the wall which had fallen down in the heavy rains during July, 2000. In support of the case of the defendants, an affidavit is filed by one Mr. Kantilal Vora, who happens to be a neighbour. A map and a report was got prepared by appointing a Court Commissioner.

2. After considering the rival side cases the Trial Court rejected the plaintiffs prayer for temporary injunction and aggrieved by the said order plaintiff has approached this Court in this Appeal from Order. Heard learned advocate Mr. Vasant S.Shah for the appellant and Mr.B.G. Jani, for Mr. D.L. Devnani, appearing on caveat.

3. Mr. Vasant S.Shah's, bone of contention is that the Trial Court has committed an error in appreciating and interpreting the Commissioner's report. According to him the wall towards east of the defendant's premises is not broken and there is no question of any repair or rebuilding of the said wall. The document relied upon by the defendant and accepted by the Trial Court indicating that the width of the road is only 4.7 feet is also erroneous. Infact road is much wider than 4.7 feet. Width of the road between the plaintiffs premises and the premises of witness Kantilal is 4.7 inches but so far as the width between the premises of plaintiff and defendant is concerned, it is wider which is not considered by the Trial Court. Mr. Shah submitted that the commissioners report indicates that the plaintiff's cots are lying in the disputed land. Despite this the Court below has rejected application for temporary injunction. He therefore urged that this appeal may be admitted and injunction may be granted. Mr. Shah submitted that the plaintiff is prepared to proceed with the suit and get it disposed of within a time frame that the Court may prescribe. The defendant is not going to be put any loss if construction is not made immediately when he has already waited for eight months. Hence, the appeal may be admitted and injunction may be granted.

4. Mr.B.G. Jani on the other hand, opposed this appeal. According to him the Court below has appreciated the facts of the case in detail. The Court has said that the plaintiff has not been able to establish his prima-facie case with regard to the disputed property. If the defendant is making any illegal construction alleged at a public road the Court has observed that appropriate forum may be moved thereof. Mr.Jani submitted that the defendant does not propose to make any construction by encroaching upon public land. He only proposes to re-build the wall which has fallen down. Mr. Jani therefore urged that there is no substance in the appeal and the same may be dismissed.

5. Having regard to the rival side contentions, if report of the Commissioner is seen in light of the observations made by the Trial Court, what emerges at the outset is that the plaintiff alleges that the defendant proposes to make an encroachment by making a fresh construction. There is nothing to indicate that such construction is proposed to be made as alleged. All that is indicated in the Commissioners report is that the wall has fallen. The defendants case is that he proposes to repair/re-build the wall that has fallen. If the defendant comes with a specific case that he does not want to make a new wall upon street land and if there is no other indications showing such intention or steps towards making of such encroachment or construction, there is no question of grant of any injunction. All that is indicated from the record is that defendant proposes to re-build the wall that has broken down in the heavy rain and there appears no reason to prevent the defendant from re-building/repairing the wall that has fallen only because he has not repaired it for 8 months. In the opinion of this Court the Trial Court has properly appreciated the facts situation and has rightly refused to grant injunction sought by the plaintiff holding that the plaintiff has no prima-facie case. If the plaintiff has no prima-facie case there is no question of granting injunction in his favour, apart from other factors. There appears no substance in the appeal. Appeal stands dismissed. No costs.

5. At this stage Mr. Shah requests for extending relief granted by the Trial Court which is operative till 20.02.2001 to enable the plaintiff/appellant to approach appropriate forum. Having regard to the facts of the case three weeks time is granted. Injunction granted in favour of the plaintiff/appellant shall continue up to 12.03.2001.

(A.L. DAVE,J.)

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